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No. 91-1259

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

LITTON MICROWAVE COOKING PRODUCTS, DIVISION OF LITTON SYSTEMS, INC., ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's determination that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by departing from its past practice of granting a merit wage increase to employees without bargaining with the union.

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§ 8(d), 29 U.S.C. 158(d) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 949 F.2d 249. The decision and order of the National Labor Relations Board (Board) (Pet. App. B1-B50) are reported at 300 N.L.R.B. No. 37.

JURISDICTION

The judgment of the court of appeals (Pet. App. D1) was entered on November 12, 1991. The petition for rehearing was denied on December 23, 1991. Pet. App. E1. The petition for a writ of certiorari was filed on January 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a plant for the manufacture of microwave cooking products in Sioux Falls, North Dakota. Pet. App. B2. In September 1980, the United Electrical, Radio and Machine Workers of America (the Union) was certified as the bargaining representative of petitioner's Sioux Falls production and maintenance employees. From the opening of the Sioux Falls plant in 1977 until 1980, petitioner granted merit wage increases to most of its production and maintenance employees in both August and February of each year. *Id.* at C9. Under the formula used by petitioner to grant merit increases, the employees were due to receive a wage increase in February 1981. *Id. at* B24, B35 n.47.

Negotiations between the Union and petitioner for a collective bargaining agreement began on October 7, 1980, and concluded on February 19, 1982, after the parties failed to reach agreement. Pet. App. B21. At a bargaining session on December 9, 1980, the parties first discussed petitioner's wage proposal, which included an annual August increase in wages. At that meeting, the Union stated that petitioner should continue its past practice of giving a February wage increase until agreement was reached on a new contract. *Id.* at C3-C5. Petitioner responded that the prior February increases did not reflect its settled policy, but, rather, were exceptions to its practice of granting increases only in August. *Ibid.* Petitioner's wage policy was again discussed at the January 22, 1981, bargaining session when the Union complained about petitioner's refusal to grant the February increase. Petitioner again responded that previous February increases were an exception to its general policy. *Ibid.*

No wage increase was given in February 1981. Pet. App. C8. On August 3, 1981, petitioner implemented changes in wage rates and certain other terms of employment, consistent with its last proposal to the Union as of that date. The proposal did not include a regular February wage increase. *Id.* at B30-B31.

2. a. The ALJ found that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), in 1981, by unilaterally departing from its past practice of granting semi-annual merit wage increases. Pet. App. B24, B26 n.34, C13-C14. The ALJ rejected petitioner's assertion that it had no past practice of wage reviews and raises in February of each year. The ALJ relied on a company memorandum to all the Sioux Falls employees setting out the twice-yearly review policy, *id.* at C9-C10, and noted that virtually all full-time employees had regularly received semi-annual raises since the opening of the plant. *Id.* at C8-C13.

The ALJ also rejected petitioner's contention that it had bargained with the Union about discontinuing the February 1981 increase. The ALJ concluded that, rather than bargain about discontinuing its policy, petitioner steadfastly maintained that it was not required to do so because it had "an 'August only' wage review[.]" Pet. App. C13.

b. The Board affirmed the ALJ's finding that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by departing in 1981 from its past practice of granting a February wage increase. Pet. App. B24, B26 n.34, C13-C14.[1] The

[1] While the Board agreed with the ALJ that petitioner violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing its policy of regularly giving a wage increase in

Board ordered petitioner, *inter alia*, to make whole the bargaining unit employees for withholding the February increase by paying them the wage increases to which they would have been entitled beginning February 1, 1981, and maintaining that increase until August 3, 1981, the date on which petitioner lawfully implemented its final offer on wages. Pet. App. B44.

3. The court of appeals affirmed the Board's decision and enforced its order. Pet. App. A8. The court found substantial evidence in the record to support the Board's position that it was petitioner's practice to grant a February wage increase and that petitioner never bargained about the February 1981 merit increase. *Id.* at A6. The court observed (*ibid.*):

> Litton had given merit increases in January or February of each year since the plant was opened. It notified employees about the program of increases via the employee handbook and notices posted in the plant. In 1981 it simply discontinued the February increases, maintaining that it had never established a practice of giving the increases.

The court rejected petitioner's contention that "it could not have granted a February merit increase because doing so would have been a unilateral change in wages imposed before reaching impasse." Pet. App. A6. Citing *NLRB* v. *Katz*, 369 U.S. 736 (1962), the court explained that, where an employer has a practice of granting merit increases, it may not dis-

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February, it disagreed with the ALJ that this conduct was "linked to the ongoing negotiations in such a way as to frustrate the reaching of an agreement." Pet. App. B24. Accordingly, the Board rejected reliance on the unilateral action to establish that petitioner's overall course of bargaining was in bad faith. *Id.* at B26.

continue that practice unilaterally, but "must maintain the general outline of the program and consult the bargaining agent about implementation of the program." Pet. App. A6.

ARGUMENT

1. Under Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d) of the Act, 29 U.S.C. 158(d), defines the duty to bargain as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." In *NLRB* v. *Katz*, 369 U.S. at 737, the Court held that an employer may not make a change in existing terms of employment "without first consulting a union with which it is carrying on bona fide contract negotiations." The Board has interpreted *Katz* to mean that an employer must bargain to impasse before making changes in existing employment conditions. See *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59, 64-65 (1964); *Alsey Refractories Co.*, 215 N.L.R.B. 785, 786 & n.6 (1974).

Petitioner contends (Pet. 8-10) that the decision of the court below conflicts with *NLRB* v. *Nabors Trailers, Inc. (n/k/a Steego Transportation Equipment Centers, Inc.)*, 910 F.2d 268 (5th Cir. 1990), cert. granted, 111 S. Ct. 1680, cert. dismissed, 112 S. Ct. 8 (1991). In *Nabors*, 910 F.2d at 273, the Fifth Circuit rejected the Board's longstanding position by holding that "there is no violation of [Section 8(a)(5)], even in the absence of an impasse,

if the employer notifies the union that it intends to institute the change and gives the union the opportunity to respond to that notice." [2] Because the Fifth Circuit's position was contrary to that of other courts of appeals that had addressed the issue,[3] the Board filed a petition for certiorari in *Nabors* to consider whether an employer must ordinarily bargain to impasse before implementing unilateral changes in working conditions that are mandatory subjects of bargaining. This Court granted the petition, 111 S. Ct. 1680 (1991), but subsequently dismissed it at the request of the parties after they reached a settlement.

This case does not present an opportunity to resolve the issue presented in *Nabors*. The court of appeals did not find that petitioner unilaterally changed its practice of granting a February wage

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[2] See also *NLRB* v. *Pinkston-Hollar Construction Services, Inc.*, No. 90-4483 (5th Cir. Feb. 27, 1992), slip op. 2837 (relying on *Nabors* to reiterate the Fifth Circuit's position that it "is not a violation of the duty to bargain collectively, even in the absence of an impasse, if the employer notifies the union that it intends to institute [a] change and gives the union the opportunity to respond to that notice.").

[3] See *Carpenter Sprinkler Corp.* v. *NLRB*, 605 F.2d 60, 64-65 (2d Cir. 1979); *Richmond Recording Corp.* v. *NLRB*, 836 F.2d 289, 292-293 (7th Cir. 1987); *NLRB* v. *U.S. Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963), and other cases cited in the petition for a writ of certiorari, at 14, in *Nabors*, No. 90-1165. After the petition in *Nabors* was filed, but before it was dismissed, this Court relied on its decision in *Katz* to observe in dictum that "[t]he Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Financial Printing Div.* v. *NLRB*, 111 S. Ct. 2215, 2221 (1990).

increase without bargaining to impasse; rather it affirmed the Board's determination that petitioner discontinued its past practice without bargaining *at all*. The Board found that the February wage increase was an established part of petitioner's wage structure, and was therefore a mandatory subject of bargaining. The Board further found that, when the Union sought to bargain about the wage increase that was due in February 1981, petitioner contended that it did not have a policy of giving such an increase. Petitioner subsequently failed to increase wages in February of 1981. The Board concluded that petitioner had unilaterally abolished the February wage increase without bargaining with the Union over the proposed change. On the facts as found by the Board, petitioner's conduct is a straightforward violation of the rule in *Katz* that an employer cannot make a unilateral change in working conditions without negotiating with the employees' representative over that change.[4]

In short, this case does not present the choice between the Board's bargain-to-impasse rule, which has been adopted by other Circuits, and the Fifth Circuit's view that providing the union notice and an opportunity to respond licenses the employer's unilateral change in working conditions. Petitioner's challenge to the decision of the court below raises,

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[4] Petitioner cited the Fifth Circuit's decision in *Nabors* for the first time in its petition for rehearing in the court of appeals. Prior to that time, petitioner had argued that, since the February increases were based on merit and thus involved the exercise of discretion, petitioner was precluded under *Katz* from granting the increases "absent the agreement of the union or the parties bargaining to impasse on such increases." Pet. C.A. Br. 27. The court of appeals properly rejected that argument. Pet. App. A6.

at most, an evidentiary issue as to whether the February increase was an established employment practice and whether petitioner changed that practice without bargaining about the change with the Union. The court of appeals determined that there was substantial evidence in the record to support the Board's position that "the February increase was [petitioner's] practice and that [petitioner] *never bargained* about the 1981 merit increase." Pet. App. A6 (emphasis added). Further review of these findings is not warranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

2. Petitioner is on no firmer ground in contending (Pet. 11-13) that, since the February increases were based on merit and thus involved the exercise of discretion, *Katz* precluded granting the increases while petitioner was bargaining with the Union. The Court in *Katz* held that, where merit wage increases are largely discretionary, they cannot be implemented until the employer has bargained with the union over implementation of the increases. However, nothing in that decision suggests that, where, as here, the employer has a regular policy of granting merit increases at a particular time, it can abandon that policy unilaterally.[5] On the contrary, *Katz* holds that

[5] Petitioner appears to argue (Pet. 11) that it bargained over the February wage increase because it notified the Union in November 1980 of its wage proposal, which included a once-yearly increase in August, and negotiated with the Union over that proposal on three occasions before the end of February 1981. In presenting its proposal for an "August only" merit increase, however, petitioner adhered to the position that its proposal for a once-yearly increase represented settled company policy, and thus refused to engage in direct bargaining with the Union concerning the customary February merit increases. See Pet. App. C13-C14.

"an employer's unilateral change in conditions of employment under negotiation is * * * a violation of [Section] 8(a)(5)." 369 U.S. at 743.

3. Petitioner contends (Pet. 10) that Board cases establish that "in the context of good-faith bargaining, an employer may withhold a wage increase during negotiations and condition the granting of wage increases on reaching a final contract settlement." The decisions on which petitioner relies do not apply to this case. In *Shell Oil Co.*, 77 N.L.R.B. 1306, 1309-1310 (1948), the Board held that the employer did not engage in unlawful discrimination in refusing, during bargaining negotiations for represented employees, to give those employees wage and hour improvements recently granted to unrepresented employees. In contrast with this case, the unionized workers in *Shell Oil* were not seeking to preserve the status quo; the concessions they sought represented a *change* from pre-existing wage policy. In *B.F. Goodrich Co.*, 195 N.L.R.B. 914, 915 (1972), the Board applied the principle articulated in *Shell Oil* to benefits other than wages, holding that the employer was not required to grant to organized employees new profit-sharing benefits that had previously been granted to unorganized employees.

In *American Telecommunications Corp.*, 249 N.L.R.B. 1135, 1137 (1980), the Board determined that the employer violated Section 8(a)(1) by denying benefits to recently organized employees that it had granted to unorganized employees because the disparate treatment was due to anti-union animus. There is no finding of anti-union animus in this case. Finally, in *Winn-Dixie Raleigh, Inc.*, 267 N.L.R.B. 231, 235-236 (1983), the Board ruled that the employer did not violate the Act by temporarily

withholding a regular annual wage increase from represented employees but not from unrepresented employees. Although acknowledging that the employer was obliged to "maint[ain] * * * preexisting practices," *id.* at 235, the Board noted that the issue of the annual increase and its magnitude was under active negotiation during the period in question, and that the employer implemented the increase as soon as the differences over the amount were resolved. Here in contrast, there was no bargaining over the February semi-annual increase at the time the increase was withheld; indeed, petitioners maintained that there was nothing to bargain about. See *Guy Gannett Publishing Co. d/b/a Central Maine Morning Sentinel*, 295 N.L.R.B. No. 42 (June 15, 1989), slip op. 8 (distinguishing *Winn-Dixie Raleigh* from the situation in which, as here, the amount of the benefit was not under discussion at the time it was withheld).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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